

There was no amendment filed to KES's application in the one and one-half years during which its application remained pending, awaiting designation for hearing. On March 22, 1993, however, KES resubmitted an amendment previously filed with the Commission on March 10, 1993, whereby KES states that it wishes to switch its financial reliance from Superior Mortgage to First Interstate Bank. Petition, Attachment 1. KES states that on March 9, 1993, it discovered that Superior Mortgage withdrew its "financial commitment" (Petition at 2) and that it therefore promptly secured a new source of financing. KES argues that it has satisfied the Commission's requirements for demonstrating "good cause" for the post-designation amendment by showing "due diligence," "involuntariness," "no modification of issues of parties," "no disruption to hearing," "no prejudice," and "no competitive advantage." Petition at 3-6.

KES's amendment must be denied. Under Commission precedent, prior to submitting a broadcast application, an applicant must be financially qualified. Revision of Application for Construction Permit for Commercial Broadcast Stations, 4 FCC Rcd 3853, 3859 ¶ 44 (1989); Amendment of Part 73 of the Commission's Rules to Modify Processing Procedures for Commercial FM Broadcast Stations, 7 FCC Rcd 5074, 5078 n.24 (1992) ("an applicant seeking to correct [an] underlying problem would have to submit an amendment showing that it was financially qualified at the time of application"). A broadcast applicant has the burden of establishing its financial qualifications. 47 U.S.C. § 308(b); see Northampton Media Associates v. FCC, 941 F.2d 1214 (D.C. Cir. 1991). In order to be financially qualified, an applicant must have secured a "present firm intention" from a financing source, future conditions permitting, of sufficient funds to construct and operate its proposed station for three months without revenues (Merrimack Valley Broadcasting, Inc., 82 F.C.C.2d 166, 167 (1980);

Financial Qualifications Standards for Aural Broadcast Applicants, 68 F.C.C.2d 407, 408 (1987)), and that financing source must have adequate funds to provide the loan. As the Review Board has stated:

This financial test does not turn on the subjective intent of the applicant, but upon a narrower and more objective inquiry to determine if, at the time an applicant certified its financial qualifications, it had reasonable assurance of the required funds from a committed source.

Bennett Gilbert Gaines, Interlocutory Receiver for Magic 680, Inc., FCC 93R-3 (Rev. Bd. March 5, 1993). With regard to financial amendments, an applicant seeking to amend its application beyond the relevant cut-off date is required to make a "full financial showing" demonstrating its initial financial qualifications. Radio Representatives, Inc., 6 FCC Rcd 6995 (1991). An applicant that certified initially to its financial qualifications will not be permitted to amend without first demonstrating that it was financially qualified at the time of the original certification. Albert E. Gary, 5 FCC Rcd 6235, 6236 ¶ 10 (Rev. Bd. 1990); Pepper Shultz, 5 FCC Rcd 3273 ¶ 2 (1990). An applicant must establish its initial financial qualifications as an essential ingredient to a "good cause" showing for a later financial amendment. Marlin Broadcasting of Central Florida, 5 FCC Rcd 5751 (1990). In order for an amendment to be accepted, an applicant must demonstrate that its initial certification was valid. Mabelton Broadcasting Co., 5 FCC Rcd 6314, 6326 n.36 (Rev. Bd. 1990). In the event an applicant was not initially financially qualified, it cannot rely on a later-obtained letter in support of its financial qualifications. Marc A. Albert, 6 FCC Rcd 6235 (Rev. Bd. 1991); Texas Communications Limited Partnership, 7 FCC Rcd 3186, 3187 (1992); Ponchartrain Broadcasting Co., FCC-93-156 ¶ 11 (March 31, 1993).

determination, stating:

The Performance letter must be deemed to be even less than an accommodation letter. Performance simply did not have the capability to make a loan of \$2.8 million [Performance] acted only as a broker....Scioto Broadcasters, 5 FCC Rcd 5158, 5160 (Rev. Bd. 1990), aff'd, 6 FCC Rcd 1893 (1993), has set down guidelines to determine whether a given financial proposal constitutes reasonable assurance of committed sources of funds. [The applicant] has failed to meet any of these guidelines, which the Commission has deemed essential aspects of reasonable assurance of committed sources of funds. The most that can be said of Performance's posture is that it speculated that [it] might be able to secure a \$2.8 million loan, but that did not constitute reasonable assurance.

Gaines, FCC 93R-3 at ¶ 31 (emphasis added). The Review Board stated that the "ultimate conclusion that [the applicant] did not have reasonable assurance and is therefore not financially qualified is fully supported by the factual record and controlling precedent." Gaines ¶ 32.

In a similar fashion in this case, KES has not, and can not, establish that it was financially qualified at the time it filed its original financial certification because it was "relying," for the past one and one-half years, on a "source" (Superior Financial Mortgage Lending Service) that does not itself extend loans or otherwise provide funding, but merely finds loans for its customers as a broker, on a commission basis. Therefore, KES did not have a reasonable assurance of financing from a committed source of funds that had the funds necessary to provide to it. In Aspen FM, Inc., 6 FCC Rcd 1602 (1991), the Commission stressed that an essential part of a demonstration of "good cause" is a showing that the applicant had reasonable assurance of financing at the time of certification, and the Commission has been "increasingly stringent in enforcing this requirement." Id. at 1603 ¶ 13; see also Georgia Telecommunications Commission, 7 FCC Rcd 7996, 7998-99 ¶ 4 (1992). Moreover, it

appears that KES has implicitly acknowledged that its original ostensible "source of financing" was not adequate to satisfy the Commission's standards. The Gaines case was released on March 5, 1993. "Coincidentally," just five days later, KES "lost" its financing, which has provided it with the facial justification to attempt to quickly leap away from its original deficient source of financing -- a "source" that it independently could have determined was inadequate to satisfy the Commission's standards long ago -- and to attempt to repair its application with a new source that (in contrast to its original funding source) is apparently bona fide (namely, First Interstate Bank).

The Hearing Designation Order in this proceeding has not yet been published. Therefore, a deadline date for filing motions to enlarge issues in this proceeding has not yet been established. Forbes intends to file a timely motion, if necessary, to formally allow the Commission to consider the adequacy of KES's original financial "source" which will allow the Commission, if necessary, to deny KES's application for lack of initial financial qualifications. In the meantime, until this crucial matter is fully considered on its merits, it would be premature for the Presiding Judge to accept the proposed amendment when a serious question exists as to whether KES has satisfied the Commission's requisite of demonstrating the existence and adequacy of KES's original financial certification.

WHEREFORE, it is respectfully requested that the "Petition for Leave to Amend and Re-Submission of Amendment, filed on March 22, 1993 by KES Communications, Inc.," be denied.

Respectfully submitted,

LORI LYNN FORBES

By: 

Dan J. Alpert

1250 Connecticut Ave., N.W.
7th Floor
Washington, DC 20036

March 31, 1993

CERTIFICATE OF SERVICE

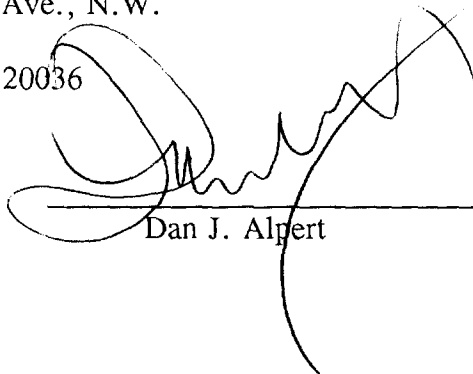
I, Dan J. Alpert, hereby certify that the forgoing document has been sent via First-Class Mail to the following:

Hon. Joseph P. Gonzalez
Administrative Law Judge
Federal Communications Commission
2000 L Street, N.W.
Washington, DC 20554

Gary Schonman, Esq.
Hearing Division, Mass media Bureau
Federal Communications Commission
2025 M Street, N.W., Room 7212
Washington, DC 20554

Cary S. Tepper, Esq.
Meyer, Faller, Weisman and
Rosenberg, P.C.
4400 Jenifer St., N.W.
Suite 380
Washington, DC 20015

Mark Van Bergh, Esq.
Waysdorf & Van Bergh
1000 Connecticut Ave., N.W.
Suite 504
Washington, DC 20036



Dan J. Alpert